

1964

Metropolitan Water District of Provo City v. Provo River Water Users' Association : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the
State of Utah

UNIVERSITY OF UT,

JUN 30 1964

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METROPOLITAN WATER DISTRICT
OF PROVO CITY, a public corporation,
Plaintiff-Respondent,

vs.

PROVO RIVER WATER USERS AS-
SOCIATION, a corporation,
Defendant-Appellant.

CASE
NO. 10,000

F I L E D

MAR 30 1964

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fourth Judicial District
Court for Utah County
HON. JOSEPH E. NELSON, Judge

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In the Supreme Court of the State of Utah

METROPOLITAN WATER DISTRICT
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Plaintiff-Respondent,

vs.

PROVO RIVER WATER USERS AS-
SOCIATION, a corporation,
Defendant-Appellant.

**CASE
NO. 10,000**

BRIEF OF RESPONDENT

NATURE OF CASE

Respondent does not disagree with appellant's general statement in this regard.

DISPOSITION BY TRIAL COURT

The trial court found the agreement contended for by respondent, and by its judgment gives effect to such agreement. Respondent seeks only an affirmation of the trial court's Findings, Conclusion and Judgment.

STATEMENT OF FACTS

The statement of facts set forth by appellant are essentially correct, except that we believe they need amplification in at least four particulars.

First, on page nine of its brief, appellant says that "No contract exists between the respondent District and the United States pertaining to this project." This is true, but is somewhat misleading because the subscription contract between appellant and respondent dated September 18, 1937, specifically provides that the payments to be made by the respondent District to the appellant Association sometime in the future are to be made to the appellant Association and to the United States jointly. The language of that contract was not changed by the Amendatory Subscription Contract of February 3, 1947, and reads as follows:

"All monies payable hereunder by the District to the Association on account of (a) the purchase price of the stock of the District in the Association, and (b) of the default of some other stockholder in the payment of the purchase price of the stock of such other stockholder in the Association, shall be paid by the District to the Association and the United States jointly." (Pl. Exh. 4, P. 13).

Second, on page ten of its brief, appellant admits that from 1947 through 1960, a period of 14 years, the auditor's reports on appellant's books show that the \$6,000.00, together with interest accruals from the investment thereof, were credited to the stock subscription account of respondent. The following language or language of similar import appears in the Annual Auditor's Reports on

appellant's books made by various accounting firms covering the years 1947 to 1960, inclusive: (Pl. Exhs. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22).

"Because of debt limitation restrictions, an advance payment of \$6,000.00 was made by the Metropolitan Water District of Provo City to be held for future application on its share of future U. S. contract obligation assessments. The amount advanced to the Association has been invested in United States Savings Bonds, Series "J". Earnings on these investments have been credited to the account of the Provo Metropolitan Water District." (Pl. Exh. 22).

Third, on pages nine and ten of appellant's brief, it is admitted that on March 14, 1947, being about six weeks after the execution of the Amendatory Subscription Contract, a motion was passed by the Board of Directors of appellant Association providing that the \$6,000.00 paid to appellant be not mingled with appellant's general funds, but that it be placed in a separate account and invested at the highest rate of interest consistent with safety, with interest on the investment to accrue to the credit of respondent. The exact language of the minutes of the meeting appellant's Board of Directors held on March 14, 1947, is as follows:

"It was moved by Attorney Harris that the \$6,000.00 paid by the Metropolitan Water District of Provo on its Subscription Contract be not mingled with Association general funds, but that it be placed in a separate account and invested at the highest rate of interest consistent with safety; the President, Treasurer and Mr. Beesley be and are hereby authorized to make the investment and report their action. In-

terest on the investment to accrue to the credit of the Metropolitan District. Duly seconded and passed." (Pl. Exh. 1, P. 3).

As appears in the minutes above quoted, the motion was made by Fisher Harris, who was the general counsel for appellant and was also acting for respondent. Mr. Harris does not remember ever having made the motion, but does not deny that it was made by him and that it is a part of the official minutes of the appellant Association. (T. 111). This motion sets forth the substance of the agreement contended for by respondent and found by the trial court.

Fourth, on page ten, appellant admits that it raised no question about the entitlement of the respondent to a credit of the interest accruals on the investment of \$6,000.00 until March 11, 1955, at which time Fisher Harris again advised the Board of Directors of appellant Association that the accumulations belonged to the appellant, but were to be applied on respondent's Subscription Contract debt when the first payment on that debt became due. The exact language of the minutes of appellant's Board of Directors in that regard is as follows:

"Mr. Harris, reporting the disposition of Provo City's bond and interest (held by the Association) said they belong to the Association as an advance payment on the Subscription Contract and that the amounts will have to remain in the Association's custody until the first payment is made on the Subscription Contract debt. Mr. Harris moved that the interest be invested in Government Bonds as fast as amounts sufficient to make a purchase are accumu-

lated. Motion seconded by Mendenhall and carried.” (Pl. Exh. 8, P. 2). (Emphasis supplied)

In view of the somewhat complex nature of the facts, respondent believes that a paraphrase thereof might be helpful to point up respondent’s position with respect to this appeal. In so doing, the letter A will be used in place of appellant, Provo River Water Users Association, the letter D in place of respondent, Metropolitan Water District of Provo City, and the letter U, in place of the United States. The citations designated, “Br.”, are to page numbers of appellant’s brief. Paraphrased, then, the facts which we believe are material to a consideration of the legal issues involved in the appeal are as follows:

Under a written agreement made in 1937, D would become liable to A for 8,000 shares of A’s capital stock at some future time in an amount not to exceed \$820,800.00. (Br. 4 & 5). The agreement provided that the amount which D had to pay A for the stock and the times of payment were dependent upon the amount and times A had to pay U under another contract which A had with U, and which latter contract provided that A should pay the money it would collect from D, sometime in the future, over to U. (Br. 4). In D’s contract with A, D was obligated to pay the money whenever it became due to both A and U, jointly. (Pl. Exh. 4, P. 13).

With that situation existing, and no payments yet due under the D-A contract, in November, 1946, A proposed that D’s maximum liability for the 8,000 shares of capital stock be increased from \$820,800.00 to \$1,231,200.00. (Br. 5, 6 & 8). (This figure is arrived at by adding together the \$912,000.00 direct liability and the \$319,-

200.00 default liability.) For reasons important to D, D did not want to be liable to A in excess of \$1,225,200.00, which was \$6,000.00 less than A's proposal. (Br. 6). So, D proposed to A that it pay to A \$6,000.00 in advance so that its total aggregate liability would not exceed \$1,225,200.00, if A would agree to invest that money until it became payable to U, and if A would also credit D with the interest it might earn until that time. (Fdg. 6 & 7, R-121). A's agent and attorney agrees to this, and thereafter D pays the \$6,000.00 to A. (T. 42, 45, Fdg. 6 & 7, R-121).

Thereupon, on February 3, 1947, the D-A stock purchase contract of 1937 was amended in writing and the amendment recites that the new total aggregate liability of D for the 8,000 shares of stock shall not exceed a total sum of \$1,231,200.00, less \$6,000.00 previously paid by D to A on the purchase price of said stock. (Br. 7, 8).

The exact language of the provision in the Amendatory Stock Subscription Contract of February 3, 1947, with respect to the increase in D's total aggregate liability is as follows: (Pl. Exh. 6, P 2.).

"15. Anything herein to the contrary notwithstanding, it is agreed that the **total aggregate liability** of the District for payment under the terms of this contract

(a) To the Association for the purchase of the stock of the District in the Association shall **not exceed** the sum of \$912,999.00, less \$6,000.00 previously paid by the District to the Association on the purchase price of said stock; and

(b) To the Association, on account of the default of some other stockholders in the pay-

ment of the purchase price of the stock of such other stockholders in the Association **shall not exceed the sum of \$319,200.00.**" (Emphasis supplied)

The agreement or understanding which the trial court found with respect to the handling by A of D's \$6,000.00 advance payment pending the time some amount actually became fixed, owing, and payable, was not spelled out in the Amendatory Contract. In any event, however, at the first meeting of A's Board of Directors following the signing of the Amendatory Contract, the agent and attorney of A, (who drafted the amendment) (T. 109, 110), made a motion that the \$6,000.00 be not mingled with A's general fund, but that it be invested at the highest rate of interest consistent with safety, with the interest to accrue thereon to the credit of D. The exact language of that motion appears at page 3 of this brief, and in substance sets forth the entire provisions of the agreement contended for by D, testified to by witness John O. Beesley, and that found by the trial court.

For about 14 years thereafter, A carried not only the \$6,000.00, but also the interest earned by the \$6,000.00, on its books and records as a credit to D in compliance with the agreement contended for by D and as found by the trial court. In each and every year during those 14 years, the books of A were audited by various auditing firms, and in every audit report the auditors called attention to the fact that A's books showed that U. S. Government Bonds costing \$6,000.00 were purchased from the proceeds of stock subscription payments made by D to A and that the interest received on the bonds was being

credited to the subscription account of D. (Br. 10). The auditor's reports were distributed to A's Directors in each year. (Fdg. 13, R-123).

A's agent and attorney in the year 1955 again advised his Board of Directors that not only the \$6,000.00 but also the accumulated interest earned by the \$6,000.00 would have to be held by A until D's first payment became due under the subscription contract. A's Board of Directors' minutes in this regard are quoted on page 4 of this brief.

For some unexplained reason, after crediting D's account with the interest accumulations for 14 years, A suddenly reverses itself and decides that the \$6,000.00 paid by D 14 years previous, as what it then and for 14 years thereafter recognized as an advance payment on a potential liability not then due, was really paid by D unconditionally and A could do with it whatever it pleased. Therefore, A reasoned, the interest which had been earned by the \$6,000.00 is the absolute property of A, notwithstanding the previous action of its Board of Directors, and A has no obligation to give D any credit for the same now or in the future, and so appropriated it to its own use (Br. 10).

STATEMENT OF POINTS

POINT I

THE AGREEMENT FOUND BY THE TRIAL COURT IS AMPLY SUPPORTED BY THE EVIDENCE.

POINT II

THE AGREEMENT FOUND BY THE TRIAL

COURT IS SUPPORTED BY AN ADEQUATE LEGAL CONSIDERATION.

POINT III

THE PAROL EVIDENCE RULE DOES NOT PRECLUDE THE AGREEMENT FOUND BY THE TRIAL COURT.

POINT IV

APPELLANT'S POINTS I, IV, AND V ARE ER-RONEOUSLY PREMISED AND ARE WITHOUT MERIT.

ARGUMENT

POINT I

THE AGREEMENT FOUND BY THE TRIAL COURT IS AMPLY SUPPORTED BY THE EVIDENCE.

The trial court found, in substance and effect, that the \$6,000.00 check delivered to appellant by respondent on or about December 2, 1946, was an advance payment on a potential liability of respondent to appellant. It further found that the advance payment was made upon the mutual understanding of the parties that the proceeds of the check would be invested by appellant at the highest rate of interest consistent with safety, and that interest earned thereon, as well as the \$6,000.00 advance payment, would be applied in reduction of respondent's indebtedness to appellant and the United States, jointly, as such time as an actual payable indebtedness arose. (Fdgs. 6 & 7, R-121).

The evidence supporting these findings is as follows:

(1) The testimony of John O. Beesley, a director of both appellant and respondent, that such was the understanding at the time the \$6,000.00 check was delivered. (T: 34 to 67).

(2) The admission and ratification of appellant in the form of a resolution passed by its Board of Directors at the first regular meeting of the Board after the check was delivered, which resolution sets forth the substance of the agreement contended for by respondent and found by the trial court. (Pl. Exh. 1, P. 3).

(3) The fact that appellant has carried the interest accumulations attributable to the \$6,000.00 invested in U. S. Government Bonds, paid to it by respondent, on its books and records as a credit to the subscription account of respondent every year from 1947 through 1960, inclusive. (Pl. Exhs. 9 through 19 and 22).

(4) The fact that the books of appellant have been audited by various certified public accounting firms in each year 1947 through 1960, and in each and every such year the reports of the auditors called attention to the fact that U. S. Government Bonds costing \$6,000.00 were purchased from the proceeds of stock subscription payments made by respondent, and that interest received on the bonds was being credited to the subscription account of respondent. (R-24, 112; Pl. Exhs. 9 through 19 and 20).

(5) The fact that such audit reports were regularly distributed to appellant's Board of Directors, and appellant issued no instructions to its auditors, accountants or bookkeepers at any time from 1947 to 1960, inclusive, changing the method of handling the interest accumulations. (R-26, 112, T-56, 112).

(6) The fact that appellant produced no evidence and was unable to explain why the resolution of March 14, 1947, setting forth the exact agreement contended for by respondent was proposed by Fisher Harris, (who drafted the contract and carried the negotiations), and was passed by appellant's Board of Directors. (T. 81, 112).

POINT II

THE AGREEMENT FOUND BY THE TRIAL COURT IS SUPPORTED BY AN ADEQUATE LEGAL CONSIDERATION.

The consideration for the agreement found by the trial court was the advance payment of \$6,000:00 at a time when no monies were due. Another consideration is respondent's entering into the Amendatory Subscription Contract of February 3, 1947, increasing respondent's maximum total aggregate liability to appellant at a time when the contract of September 18, 1937, providing for a lower aggregate liability was still in effect. Respondent was not legally obligated to do either, and either is an adequate consideration for the agreement found by the trial court.

POINT III

THE PAROL EVIDENCE RULE DOES NOT PRECLUDE THE AGREEMENT FOUND BY THE TRIAL COURT.

Appellant contends that the agreement found by the trial court alters, amends, or changes the terms of the Amendatory Subscription Contract of February 3, 1947, and therefore is in violation of the parol evidence rule.

It is respondent's position that there is no conflict at all between the provisions of the Amendatory Subscription Contract of February 3, 1947, and the agreement found by the trial court. The written contract says in effect that the "**total aggregate liability**" of the respondent for payment under the terms of the contract "**shall not exceed**" the sum of \$1,231,200.00, less \$6,000.00 previously paid by respondent to appellant on the purchase price of the stock. Respondent agrees both that the total aggregate liability cannot exceed the stated amount, and agrees that the \$6,000.00 was paid in advance on the purchase price of the stock to reduce the proposed maximum total aggregate liability by \$6,000.00. Respondent does contend, however, that there was a further or additional agreement (the one found by the trial court), not in conflict with the written document, which spelled out what appellant was to do with the advance payment of \$6,000.00 until it could be applied as the parties obviously intended, and as required by the written contract, i. e., pay the same over to the United States when the United States called for payment under appellant's contract with the United States. (R-67).

Under the well accepted doctrine of collateral contract, the parol evidence rule does not preclude parol proof of a prior or contemporaneous oral contract that is collateral to, and not inconsistent with the written contract, although it relates to the same general subject matter and grows out of the same transaction. (20 Am. Jur. 993; 70 ALR 770).

This court held in **Farr vs. Wasatch Chemical**, 105 U. 272, 143 P. 2d 281, that a lessor's oral agreement to make a leased warehouse tenantable could be proved by parol evidence, and did not alter or vary the terms of the written lease requiring lessee, after occupancy, to make repairs and alterations. In its opinion, the court quoted **Wigmore on Evidence**, Section 2430 as follows:

"The inquiry is whether the writing was intended to cover a certain subject of negotiation; for if it was not, then the writing does not embody the transaction on that subject Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto This intent must be sought in the conduct of the parties and the surrounding circumstances The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered In deciding upon this intent, the chief and most satisfactory index for the Judge is found in the circumstances whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element;

if it is not, then probably the writing was not intended to embody that element of the negotiation."

Certainly, the written Amendatory Subscription Contract of February 3, 1947, makes no mention of the investment of the advance payment of \$6,000.00, and the crediting of interest to the respondent in addition to that payment. And, the motion of Fisher Harris passed by appellant's Board of Directors on March 14, 1947, the subsequent crediting of the interest for a period of 14 years, the fact that the motion was made by the same person who drafted the written document, the fact that the written document provided that payments were to be made to the appellant and to the United States jointly, and the fact that a payment of \$6,000.00 was made at a time when no monies were due, also furnishes a sound basis for the conclusion apparently reached by the trial court that the parties did not intend to cover their oral agreement in their writing. See also, **Utah-Idaho Sugar Company vs. State Tax Commission**, 73 P. 2d 974, **Nuttal vs. Berntson**, 30 P. 2d 738, **Garrett vs. Ellison**, 72 P. 2d 451.

In **Young vs. Texas Company**, 8 Utah 2d 206, 331 P. 2d 1099, this court held that proof of an oral agreement of a lessor to seek a variance in a zoning ordinance was not inadmissible as varying the provisions of a written lease. The court stated:

"The answer to that contention is that such an agreement made contemporaneously with the lease as to the accomplishment of the objective and any evidence on this subject would not vary the terms of the written lease, but would rather explain it."

In the case at bar, it seems clear to us that the agreement found by the trial court does not vary the terms of the written document, and not only serves to explain it, but also serves to explain all of the subsequent acts of appellant, including the motion of Fisher Harris of March 14, 1947, and the manner of appellant's bookkeeping for 14 years.

Aside from the agreement found by the trial court, it is respondent's contention that the decree of the trial court may be upheld upon at least two other theories.

First. That the \$6,000.00 was paid to appellant by respondent at a time when no monies were due, for the sole purpose of discharging, pro tanto, a future indebtedness for appellant's capital stock, which money respondent is obligated by contract to pay to the appellant and the United States jointly, and which money appellant is obligated by contract to pay over to the United States. Under an elementary trust principle, where money or property is delivered by one person to another to be held or paid over by the latter for a certain purpose, or generally for the benefit of the former or a third person, an express trust exists by inference. 54 Am. Jur. 70. Further, a trustee is always accountable for all profits and gains arising from the trust estate.

Second. While no case precisely in point could be located, it seems to the writer that after appellant has carried the \$6,000.00 as a credit to respondent on its books and records for 14 years, and has likewise credited the interest earned on that \$6,000.00 to the account of the respondent, that it could not now reverse itself and claim

that the monies were improperly applied. See, 40 Am. Jur. 803, wherein appears the following:

“A creditor who appropriates a payment in a particular way is bound by his act and cannot afterwards change the application without the consent of the debtor, for the law regards the rights of the parties as becoming fixed at the time the application is so lawfully made, insofar as the original debtor and creditor are concerned. Therefore, where there is no direction as to the application and it is entered as a general credit on the general account, the creditor cannot make an application afterward to any specific part of the account to serve his interests as may be subsequently developed.”

POINT IV

APPELLANT'S POINTS I, IV, AND V ARE ERRONEOUSLY PREMISED AND ARE WITHOUT MERIT.

Appellant's arguments are based upon the erroneous premise that the agreement found by the trial court with respect to the manner of crediting interest accumulations is in conflict with the Amendatory Stock Subscription Contract of February 3, 1947, because it raises the “total aggregate liability” of respondent \$6,000.00 above the amount set forth in the written contract. Such is not the case.

Respondent agrees, admits and contends that the “aggregate total liability” of respondent to appellant for the 8,000 shares of stock under the written agreement of February 3, 1947, “cannot exceed” the amount stated in the written contract and agrees that this provision cannot be varied by any oral agreement to the contrary. In other words, respondent agrees that the total aggregate liability

for stock "cannot exceed" the sum of \$1,231,200.00, less the \$6,000.00 heretofore paid. By a simple arithmetic calculation the maximum amount which the total aggregate liability "cannot exceed" is \$1,225,200.00. Likewise, respondent has not and does not contend that the \$6,000.00 was not paid to lower by \$6,000.00 a proposed "total aggregate liability" of \$1,231,200.00, but on the contrary, respondent asserts that it was. That is not to say, however, that respondent now owes the sum of \$1,225,200.00 or any other amount, or at the time the \$6,000.00 was paid, respondent owed the \$6,000.00 or any other amount. The exact amount which respondent will owe and the times of payment depends entirely upon what the United States does in the future under its contract with appellant, and the amounts will not be fixed and payable until the United States takes some kind of action under its contract with appellant. As heretofore indicated, our contention is that at the time the \$6,000.00 was paid, respondent owed appellant nothing, does not now owe it anything, and that the \$6,000.00 was simply an advance payment on the stock made by respondent pursuant to the agreement found by the trial court. This contention in no way conflicts with the written contract. Why, after recognizing the situation to be exactly as respondent contends for 14 years, appellant now determines otherwise, is beyond comprehension.

The trial court found that at the time of payment there was a collateral oral understanding that the \$6,000.00 advance payment paid to lower a proposed "total aggregate liability" would be invested by appellant as the highest rate of interest consistent with safety until it became payable to appellant and the United States, and that in

addition to the \$6,000.00 payment, respondent would also be given credit for the interest earned thereon. Such agreement in no way conflicts with the written document setting forth that the total aggregate liability shall "not exceed" \$1, 225,200.00, or the recital therein of the \$6,000.00 payment.

Upon close analysis, appellant seems to say in points I, IV and V that if the oral agreement is enforced, respondent really owes \$1,231,200.00, not \$1,225,200.00, and, therefore, the oral agreement modifies the terms of the written agreement upwards by \$6,000.00. To state the proposition is to refute it.

The oral agreement, confirmed by the Resolution passed by appellant's Board of Directors on March 13, 1947, has no effect whatever upon the amount which respondent will ultimately be required to pay the appellant, except to reduce any such amount by the interest earned and applied. How can it possibly be said, then, that this agreement conflicts with the written contract providing that respondent's ultimate "total aggregate liability" "shall not exceed" \$1,225,200.00, or that the proposed liability of \$1,231,200.00 has not been reduced by the \$6,000.00 advance payment? Likewise, under what stretch of imagination, can it be said that the collateral agreement raises respondent's total aggregate liability \$6,000.00 above the amount stated in the written contract?

As appellant's arguments in points I. IV and V are premised upon the erroneous conclusion that the collateral agreement raises respondent's total aggregate liability \$6,000.00 above the maximum provided in the written contract, they are without merit.

CONCLUSION

In conclusion, it should be pointed out that appellant has performed no services for the \$6,000.00 advance payment, and over the years, respondent has paid appellant for water and other services to the same extent and in the same fashion as all other stockholders in the appellant Association. (T-116). The \$6,000.00 has at all times been invested in U. S. Government Bonds, and these bonds along with other bonds purchased with interest accumulations have been carried on the books and records of appellant Association in a special subscription account to the credit of respondent.

Why, after recognizing for 14 years the entitlement of respondent to the interest earned on its advance payment of \$6,000.00 on a debt, not due when paid, and not yet due, appellant Association suddenly decided to reverse itself, has never been explained. Fisher Harris's motion of March 14, 1947, passed by the Board of Directors of appellant, and the manner in which the \$6,000.00 has been treated by appellant on its own books and records should be conclusive upon this controversy. The minutes of appellant's Board of Directors, as late as 1955 speaks of the bonds representing the \$6,000.00 and interest accumulations as "Provo City's bond and interest".

The trial court was convinced that respondent is entitled to a credit of the interest accumulations under a collateral agreement made many years ago, which agreement was confirmed by appellant's Board of Directors within six weeks after it was made, and which agreement has been recognized and acted upon by appellant from that time until shortly before this law suit was brought, a pe-

riod of more than 14 years. Respondent respectfully submits that the Findings, Conclusions, and Judgment of the trial court ought to be affirmed, and that there is no factual, legal, or equitable basis for appellant's belated claims.

Respectfully submitted,

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